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To: The Staff of the Division of Investment Management

From: Phillip Goldstein, Managing Partner (pgoldstein@bulldoginvestors.com)

Re: Control Share Statutes and the Withdrawal of the Boulder Letter

Date: April 28, 2021

In a 19-page letter dated December 16, 2020 to the Director of the Division of Investment Management, Susan M. Olson, the General Counsel of the Investment Company Institute, expressed the Institute's support for the withdrawal of the Boulder Letter. In her letter, Ms. Olson argues that opting into a state control share statute does not transform a voting security into a non-voting security (which registered investment companies are not permitted to issue).

As we have stated previously, we do not believe that withdrawing the Boulder letter affects whether a share is a "voting security" under Section 2(a)(42) for the same reason that it did not implicate the equal voting provision under Section 18(i). Courts have found that actions such as poison pills and opting into control share statutes do not render shares to be non-voting securities; rather they affect the voting rights of the holder. Control share statutes impose restrictions on controlling shareholders, not on the shares themselves. If transferred to a different shareholder not subject to a control share statute, the share can be voted with no issue. Sections 2(a)(42) and 18(i) both concern the voting rights of the shares themselves—the statutory text does not support a conclusion that a limitation on the holder has the effect of changing the rights attached to the share itself. Accordingly, issued shares from closed-end funds subject to a control share statute remain "voting securities." (Footnote omitted.)

Curiously, nowhere in her lengthy letter does Ms. Olson make mention of the phrase bolded below in Section 2(a)(42):

***"Voting security" means any security presently entitling the owner or holder thereof to vote for the election of directors of a company.***

Far be it from me to suggest that her omission was not an inadvertent oversight. However, it is indisputable that the purpose and effect of a control share statute is to divest the owner or holder of "control shares" of the right to vote them (absent approval by other shareholders). Therefore, it would seem that opting into a control share statute is a clear violation of Section 18(i).

However, if the staff truly believes that a registered investment company should be able to opt into a control share statute (or adopt a control share bylaw), I think the proper

course of action is not to ignore a violation of Section 18(i) but to craft a proposed exemptive rule (along with conditions for its application) that would reads as follows:

*A registered management company shall be exempt from the provisions of Subsection 18(i)(a) of the act if every share of stock it issues that is not a voting share is transferrable to a person who would have the right to vote such share for the election of directors of such company.*